

Protection of Persons in the Event of Disasters

Statement of the Chairman of the Drafting Committee

30 May 2014

Mr. Chairman,

It is my pleasure, today, to introduce the first report of the Drafting Committee for the sixty-sixth session of the International Law Commission. The report, which is to be found in document A/CN.4/L.831, contains the texts and titles of the entire set of draft articles on the protection of persons in the event of disasters, adopted by the Drafting Committee on first reading. The Committee adopted in final form the draft articles which had been provisionally adopted by the Commission, at prior sessions, as well as several new draft articles considered at this year's session.

Before commencing, allow me to pay tribute to the Special Rapporteur, Mr. Eduardo Valencia-Ospina, whose constructive approach, flexibility and patience once again greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its valuable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Mr. Chairman,

Over the course of four meetings, held from 8 to 13 May 2014, the Drafting Committee proceeded in two phases. First it considered and adopted several new draft

articles on the basis of the Special Rapporteur's proposals for draft articles 3 *bis*, 14 *bis*, and 17 to 19, which the plenary referred to it on 8 May 2014. Following the adoption of those draft articles, the Drafting Committee undertook a technical review of the entire set of draft articles. Some suggestions made during that process were left to the second reading, as they concerned points of substance. As a consequence of this review, some of the draft articles previously adopted by the Commission, on a provisional basis, were slightly adjusted, and some were re-ordered to introduce greater coherence in the draft articles. The draft articles were renumbered to reflect the new sequence. Except for those draft articles adopted for the first time this year, the numbers of the draft articles as they were previously provisionally adopted by the Commission are reflected in square brackets. For purposes of my statement today, I will be referring to the new numbers, as reflected in the report of the Drafting Committee. I wish to also point out that it was decided to leave to the second reading the question of merging draft articles, and introducing chapter headings, and drafting a Preamble.

Of the draft articles adopted at previous sessions, minor technical adjustments were made only to draft articles 9 [5 *bis*], 17 [14], and 19 [15], and to the titles of draft articles 7 [6], 13 [10], 16 [12], and 21 [4]. All the others were adopted without modification. My statement today will focus only on the new draft articles adopted for the first time this year.

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First, allow me to state for the record that the Drafting Committee considered the proposal of the Special Rapporteur for draft article 19, dealing with the relationship of the draft articles to the Charter of the United Nations. If you recall, doubts as to the necessity of including such a provision in the draft articles were expressed during the plenary debate. While the draft article was nonetheless referred to the Drafting

Committee, it was unable to reach agreement on the inclusion of the provision, and accordingly decided not to pursue it further.

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Draft article 4

Mr. Chairman,

I draw the attention of the Commission to draft article 4 on the “use of terms”, which establishes definitions of standard terms used in the draft articles, based on those proposed by the Special Rapporteur in draft article 3 *bis*. The Drafting Committee worked on the basis of a revised proposal, submitted by the Special Rapporteur, which sought to reflect the various comments and suggestions made during the plenary debate. Before turning to the definitions adopted, I wish to record that the Drafting Committee decided that it was not necessary to include definitions for “relevant non-governmental organization” and “risk of disasters”.

As regards subparagraph (a), concerning the term “affected State”, the Drafting Committee took into account the various comments made in the plenary concerning the possibility of extending the scope of the definition to include not only disasters which occur on the territory of the State, but also those occurring on territories or in areas under the jurisdiction or control of the State. Such approach was reflected in the revised proposal of the Special Rapporteur, and found favour in the Drafting Committee. The Committee drew the formulation “in the territory or otherwise under the jurisdiction or control of which” from the definition of “State of origin” in article 2, subparagraph (d), of the 2001 articles on prevention of transboundary harm from hazardous activities.

The Drafting Committee further took the view that the inclusion of “jurisdiction or control” did not contradict the reference in draft article 12 [9], paragraph 1, to the sovereignty and territory of the affected State. The scenario in that draft article is covered by the reference to the territory of the affected State, in the first part of the

definition; but is without prejudice to the possibility of other scenarios, where a State may exercise *de jure* jurisdiction, or *de facto* control, over another territory on which a disaster occurs. The Drafting Committee recognized that the implication of this is that, in exceptional cases, it is possible that there may be two affected States; that is the State upon whose territory the disaster occurs, and the State exercising jurisdiction or control over that territory. It is to be noted that the possibility of different States enjoying jurisdictional or *de facto* control, is also implied in the recognition, in draft article 21 [4], that the draft articles would apply in the context of so-called “complex disasters”, which occur on the same territory where an armed conflict is taking place. The Drafting Committee was of the view that, at the present stage, draft article 14 [11] dealing with the requirement of the consent of the affected State did not, in the absence of any special agreement between the two States, provide a definitive solution as to which affected State’s consent would be required. The Drafting Committee thought it best to leave the matter for consideration and decision during the second reading. Lastly, following the strong sentiment expressed in the plenary, a reference to the environment was inserted into the definition as proposed by the Special Rapporteur, thus bringing it into line with that of “disaster”, in draft article 3 [3], which includes a reference to “environmental damage”.

Subparagraph (b) deals with the term “assisting State”. The definition proposed by the Special Rapporteur, in his seventh report, drew no adverse comments in the plenary. The only refinement introduced by the Drafting Committee was to replace the word “acceptance” with “consent”, so that the concluding phrase of the subparagraph now reads “at its request or with its consent”. This was done for the sake of consistency with draft article 14 [11].

Subparagraph (c) deals with the term “other assisting actor” by identifying four assisting actors other than states, for purposes of the draft articles, namely competent intergovernmental organizations, relevant non-governmental organizations, other entities and individuals. The phrase “other entity” was understood as a term of art referring to the International Committee of the Red Cross (ICRC) and the International

Federation of the Red Cross (IFRC). The Drafting Committee implemented a number of technical modifications to the formulation initially proposed by the Special Rapporteur, primarily with a view to aligning the text with draft articles previously adopted by the Commission. Accordingly, the opening clause now refers to “competent intergovernmental organization, or a relevant non-governmental organization”, which is the formulation found in draft article 8 [5].

The Drafting Committee also aligned the concluding clause, which in the Special Rapporteur’s revised text read “engaged in the provision of disaster relief assistance or disaster risk reduction”, with the concluding phrase of subparagraph (b), so as to read “providing assistance to that State at its request or with its consent”. There was also a proposal to further streamline the text by deleting the clause “external to the affected State”, and simply stating “providing external assistance”, which is defined in subparagraph (d). Nonetheless, the Drafting Committee decided against doing so out of the concern that it would allow for an interpretation that a domestic actor could fall within the scope of application of the draft articles by the act of securing assistance from abroad. It was felt that the phrase “external to the affected State” would prevent this from happening, and was, accordingly more in line with the general policy that the draft articles do not apply to the activities of domestic actors. It should be recalled, for the record, that there was another view in the Drafting Committee that the issue was better dealt with in the definition of “external assistance” .

Subparagraph (d) seeks to define the term “external assistance”. The opening clause remains much as how the Special Rapporteur proposed in his seventh report. In light of some of the comments made in the plenary, the Drafting Committee was of the view that the concluding clause, in the initial proposal, referring to the essential needs of those affected by disasters, was not necessary for the definition as the concept was already included in draft article 2 [2] on “Purpose”. Accordingly, the Drafting Committee adopted a simpler formulation which reads “for disaster relief assistance or disaster risk reduction”, so as merely to reflect the purpose of the assistance being envisaged.

Subparagraph (e) covers the term “relief personnel”. The Drafting Committee worked on the basis of a revised proposal of the Special Rapporteur which took into account a number of suggestions made in the plenary. For example, in response to one such suggestion, no reference to “specialized” personnel was included. The commentary will explain, however, that assisting States typically send personnel with the necessary expertise to undertake the actions required. The initial reference to “including military personnel” was aligned with the text of what is now draft article 17 [14], paragraph 1(a), so that the opening phrase now reads “means civilian or military personnel”.

The Special Rapporteur’s revised version made reference to the personnel “having at their disposal the required equipment and goods”. This clause was deleted out of concern that it might prove too limiting, in practice, since it could exclude individuals who are sent simply because of their specialized skill-set. Nonetheless, the commentary will make the point that personnel will typically bring the equipment and goods necessary to carry out their functions. There was also a proposal to delete the definition entirely as the concept of “relief personnel” was relatively well understood. However, on balance, the Committee decided to retain it since it felt it useful to explain that the reference to “relief personnel” in the draft articles, such as in draft article 9 [5 *bis*], could mean either military or civilian personnel. This was also the reason why the Drafting Committee decided to present the two categories of personnel as alternatives, by using the word “or”, as opposed to “and”, which was done in draft article 17 [14].

Lastly, in subparagraph (f), the definition of the phrase “equipment and goods” appears largely in the form proposed by the Special Rapporteur. The Committee decided to simplify the definition further by replacing an earlier reference to “at the disposal of the assisting State or other assisting actors for the provision of disaster relief assistance or disaster risk reduction” with simply “for disaster relief assistance or disaster risk reduction”. The commentary will clarify that the reference to “other objects” is an indication that the list provided is not meant to be exhaustive. By “equipment”, what is intended is the technical equipment required by the relief

personnel to carry out their functions. By “goods”, what is being referred to is the material to be redistributed among the persons affected by the disaster. The Drafting Committee considered a proposal to include a separate definition for “services”, but decided not to do so for the reason that the term did not appear in the draft articles. Furthermore, the reference to the provision of disaster relief assistance was placed before that of disaster risk reduction, following a suggestion made in the plenary.

The title of draft article 4 was adopted as “use of terms”, as proposed by the Special Rapporteur.

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Draft article 18

Mr. Chairman,

Draft article 18, which draws from the Special Rapporteur’s proposal for draft article 14 *bis*, deals with the question of the protection of relief personnel and their equipment, as well as goods intended for relief. It establishes an obligation on the affected State to take the measures which would be appropriate in the circumstances to ensure the protection of relief personnel, equipment and goods which are present on its territory for purposes of providing external assistance. The Drafting Committee took account of the fact that the inclusion of such provision had been generally supported by the plenary, and the text as formulated by the Special Rapporteur, with the earlier phrase “all necessary measures” replaced by “the appropriate measures”, was adopted.

This amendment was introduced as a consequence of the general concern expressed in the plenary debate that the proposal of the Special Rapporteur had set too high a legal burden on the affected State. The Drafting Committee sought to mitigate that burden by taking two actions. First, the qualifier “all” was deleted. Second, the Drafting Committee scrutinized the standard of “necessary” measures. It noted that,

while the standard of “necessary” measures had been employed in draft article 17 [14], and had been included together with “appropriate” in draft article 11 [16], those provisions more closely dealt with matters under the purview of the affected State (such as the taking of legislative and regulatory action). This was less so in the context of the actions expected under draft article 18.

The general view of the Drafting Committee was that the standard implied by the phrase “appropriate measures” allowed for a margin of discretion for the affected State in deciding which actions to take. The commentary will make it clear that what is being envisaged in the provision is an obligation of conduct, and not, necessarily, one of result.

The Drafting Committee also considered a proposal to split the draft article into two paragraphs so as to distinguish between the obligation of the affected State concerning the acts of its own officials, as opposed to the obligation to prevent harm caused by non-State actors. On this point, the Drafting Committee preferred not to draw such distinctions in the text itself, on the understanding that the commentary would make the point that the flexibility implied by the concept of “appropriate measures” could have the consequence that the affected State would incur different levels of obligations depending on the actors involved. Similarly, it was considered unnecessary to refer to measures “which were at the disposal of the State”, which was a further proposal made in the Drafting Committee, since this was implied in the context-driven nature of the concept of “appropriate measures”. Other options pursued but not accepted included merely stating the obligation as “shall ensure”, or “take the necessary measures to protect”.

The Drafting Committee also considered the possibility of merging draft articles 17 [14] and 18, on the hypothesis that the protection of foreign relief personnel could fall within the general obligation of the affected State to facilitate external assistance. However, it declined to do so out of recognition that the question of the protection of relief personnel and their equipment, and relief goods, has traditionally — and for compelling policy reasons — been dealt with as a distinct matter, deserving of its own

treatment. This decision also conformed with the position of the Drafting Committee that draft articles 17 [14] and 18 envisaged different duties.

The commentary will also discuss the manner in which the provision would apply to the different categories of relief personnel, including civilian and military personnel.

The title of the draft article remains “protection of relief personnel, equipment and goods”, as was proposed by the Special Rapporteur.

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Draft article 20

Mr. Chairman,

I turn now to draft article 20, which deals with the relationship of the draft articles to special or other rules of international law. The provision has its origins in the Special Rapporteur’s proposals for draft articles 17 and 18. The Drafting Committee set out to reconcile the various concerns and positions expressed in the plenary discussion. As you can see from the text of the new draft article, the solution found was to take a simpler approach, by incorporating the ideas expressed in the two draft articles into a single article, and by replacing the Special Rapporteur’s more robust formulation with a standard without prejudice clause.

The provision is a composite of the two ideas contained in the proposals of the Special Rapporteur. The first, covered by the reference to “special rules”, deals with the possible legal effect of the draft articles on existing rules applicable to disasters, typically found in treaties, but could also include rules of customary international law, and which would constitute *lex specialis* in relation to the draft articles. The second idea covered by the reference to “other rules”, concerns the relationship of the draft

articles to other rules of international law which are not directly concerned with disasters, but which would nonetheless apply. The draft article confirms the basic policy position that the draft articles do not displace either category of rules.

A corollary of this is that where those other rules – whether special in relation to the draft articles or otherwise – do not apply to a disaster, the draft articles apply. This also accords with the position taken by the Commission in draft article 21 [4], whereby the draft articles would continue to apply *to the extent* that a disaster which occurred in the same area as an armed conflict would *not* be covered by the rules of international humanitarian law. These matters will be further elaborated in the commentary.

For the record, the Drafting Committee considered, but did not accept, a number of other drafting proposals, including: the possibility of replacing the reference to “special rules of international law” with “treaties”; referring expressly to rules of customary international law; recasting the language of the provision closer to that dealing with the application of successive treaties; and simply referring to “other rules” of international law (without specification whether they are special in relation to the draft articles, or not). The Drafting Committee also did not accept an alternative proposal which sought to describe the prevailing position in more comprehensive terms, closer to the proposals of the Special Rapporteur, and which also included a reference to the inter-temporal principle. The Drafting Committee preferred the text which it felt enjoys both the virtue of brevity and simplicity by providing only the basic orientation, while leaving the discussion of the various permutations of possible relationships to the commentary. Finally, I wish to point out that the concluding phrase “applicable in the event of disasters” tracks the formulation in draft article 1 [1].

The title of draft article 20 is “relationship to special or other rules of international law”, which reflects the two categories of rules which the provision seeks to cover.

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Mr. Chairman,

This concludes my introduction of the first report of the Drafting Committee this year. It is my sincere hope that the plenary will be in a position to adopt the draft articles on the protection of persons in the event of disasters, on first reading, as presented.

Thank you.

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